Supreme Court, U.S.
FILED

RESPONDENT'S BRIEF IN OPPOSITION
TO A PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

On February 27, a Middlesex County, New Jersey Grand Jury indicted Glen Fuller and Douglas Chappee for various violations of New Jersey drug laws. Shortly thereafter, local counsel, Richard Altman, sought the admission of R. Keith Stroup, of the firm Stroup, Goldstein, Jenkins and Pritzker, to represent Mr. Fuller on the case. Mr. Altman subsequently moved the admission of Michael Pritzker, Mr. Stroup's partner, to serve as co-counsel for Mr. Fuller.

The motion papers filed in support of the admission of Pritzker and Stroup complied with all requirements of New Jersey procedure. (Respondent's Appendix A)[1]. The supporting affidavit of Richard Altman showed that Mr. Pritzker and Mr. Stroup were members of a multi-state firm which specialized in the defense of drug-related cases. Mr. Stroup had offices in Washington D.C. while Mr. Pritzker was based in Illinois. Mr. Altman's affidavit also related that "Mr. Pritzker is used to practicing on a nation-wide basis and he has indicated that he has never missed a Court scheduled appearance for any reason other than he was held over by a Court in another jurisdiction." (5Ra). Both Mr. Stroup and Mr. Pritzker were in good standing in the bars of their respective states. Glen Fuller also submitted an affidavit in support of the motion. He indicated that he had retained Mr. Pritzker and Mr.

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[1] References to Respondent's appendix are indicated by numbers followed by the letters "Ra". References to Petitioner's appendix are indicated by numbers followed by the letter "a".

Stroup after consulting several individuals and that he was "convinced that Mr. Stroup and Mr. Pritzker are the most qualified individuals to handle my defense." (7Ra).

On July 9, 1981, Richard Altman, Esq., local counsel for Mr. Fuller, moved for the admission of Mr. Pritzker and Mr. Stroup. In support of the motion, Mr. Altman pointed out that two members of the same firm were Mr. Fuller's counsel of choice. He also noted that Mr. Pritzker had supplied an affidavit stating that neither he nor Mr. Stroup had ever failed to appear before a court of any jurisdiction when directed unless "they were on their feet in another matter." (88a).

The state did not actively oppose Fuller's motion. The prosecutor did observe, however, that, in his opinion, the case was not unduly complicated and did not warrant out-of-state counsel. "I don't frankly think it requires out-of-state counsel, other than for the reason that Mr. Fuller and Mr. Chappee, apparently want these people. I don't think they're entitled to it, as a matter of right." (91a).

Judge Hamlin denied the pro hac vice motion. He conceded that "Clearly the policy is if at all compatible with the representations of defendants, to admit competent outside counsel. I can see that and perceive that to be the policy in the Rule." (96a).

Despite the acknowledgment that New Jersey law favors a defendant's right to counsel of choice (including out-of-state counsel), Judge Hamlin invoked a per se rule against permitting

out-of-state counsel to practice in his court. His refusal to grant the application was based solely on his belief that travel would inevitably occasion delays. "While it is true that these counsel may well have fine reputations and practice in a number of jurisdictions, there are things like airplanes, there are air, air traffic control strikes, for instance, they're eminent (sic), they're going to be, as I perceive it, this case is going to be fought tooth and nail, beginning to end...." (97a).

Expanding on the above theme, the trial court observed that "I dare say that if I have two New Jersey counsel in a matter and I had to dispose of something important in this matter, a phone call, especially in a case of this significance would bring counsel promptly within a day or two, at the least. That just simply would be impossible with out-of-state counsel." (98a).

After additional speculation on the lengthy delays that could result from the admission of non-New Jersey lawyers, the court ruled that "I am satisfied the nature of the probable delay, notwithstanding dilatory and intentional, just good faith delay, and it will occur as a result of this matter and difficulty in scheduling Court's disposition, is so grave as to overcome the 'unfettered right' of a defendant to counsel of his own choosing...." (100a).

Local counsel responded by stating that Messrs. Van Ness, Pritzker and Stroup were in the courtroom and that counsel was prepared to present testimony from the three, as well as from Mr. Fuller and Mr. Chappee, as to why the pro hac vice applications

should be granted. (101a). Although Judge Hamlin had just stated that he would "love to know" (97a) how many times matters had been adjourned because of the requests of out-of-state counsel, he summarily denied the application for a hearing. (101a).

SUBSEQUENT STATE COURT PROCEEDINGS

The protracted litigation which ensued in State v. Fuller is an ironic counterpoint to Judge Hamlin's worries over delays that might be occasioned by the presence of out-of-state counsel. It was not until April 10, 1984 that Mr. Fuller entered a plea of guilty to possession of a controlled substance with intent to distribute. The plea agreement specifically reserved Fuller's right to appeal a number of pre-trial orders including the denial of counsel of choice. Mr. Fuller was subsequently sentenced to 20 years in prison and a $20,000.00 fine.

Mr. Fuller's brief to the Appellate Division challenged the denial of counsel of choice as a violation of his Sixth Amendment rights. Fuller argued that the trial court had committed constitutional error in refusing to permit Mr. Pritzker and Mr. Stroup to represent him. Fuller's contentions were explicitly grounded in his Sixth Amendment right to counsel of choice and were supported by a host of Supreme Court and federal cases interpreting the scope of a defendant's Sixth Amendment rights.

On June 19, 1986, the Appellate Division of the Supreme Court issued a 24 page opinion affirming the convictions of Chappee and Fuller. (47a). The court held that Judge Hamlin had not abused

his discretion in denying Fuller and Chappee their desired counsel.[2] According to the court, there was no "constitutional right to select an attorney who is not a member of the New Jersey bar" as long as "the bar of this State is able to provide effective counsel." (62a). The court went on to cite Williams v. Nix, 751 F. 2d 956 (1985), cert den., 105 S.Ct. 2681 (1985) for the proposition that:

> [the risk that] the presence of out-of-state counsel might hinder the orderly procession of the case is a sufficient countervailing state interest to justify the court's decision not to grant counsel of defendant's choice.

The trial judge did not abuse his discretion, according to the Appellate Division, because "the proposed attorneys were from varied and distant geographic locations." (63a). This was the only fact cited by the Appellate Division to support the conclusion that Judge Hamlin had properly exercised his discretion.

HABEAS CORPUS PROCEEDINGS

A. The District Court Decision.

On June 16, 1987, Glen Fuller filed a petition for a writ of habeas with the United States District Court for the District of New Jersey, (Ackerman, J.). The Court granted the petition on May 10, 1988. Judge Ackerman found that Glen Fuller was entitled to the issuance of the writ because the state court's decision violated respondent's Sixth Amendment right to counsel of choice.

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[2] Chappee had also sought to be represented by non-resident counsel.

(29a, et.seq.).

Judge Ackerman observed that the state court had refused to admit Mr. Fuller's desired counsel only on the basis of speculative and non-specific findings. Although a trial court has discretion in deciding whether to grant pro hac vice applications, the discretion may not be exercised arbitrarily. (35a). In the instant case, Judge Ackerman found that the applications of out-of-state counsel were denied because (1) the trial court believed that qualified local counsel were available and (2) because the court held the opinion that out-of-state counsel would delay the progress of litigation. (37a-39a).

Judge Ackerman found the first reason insufficient. "[T]he mere existence of competent in-state attorneys to defend the accused is insufficient to outweigh his Sixth Amendment right to select his own counsel." (41a). The second reason was rejected as being "the rote application" of a "blanket generalization." (42a). Thus, Judge Ackerman observed that out-of-state counsel had not requested any adjournments and were prepared to proceed on the matters at hand. In addition, Mr. Pritzker and Mr. Stroup had submitted affidavits which stated that they had never been unavailable in any court except when they were actually engaged in other proceedings. Accordingly, the District Court found that the trial court had based its denial of the pro hac vice applications purely on speculative delays. (43a).

Finally, the District Court held that the arbitrary denial of counsel of choice can never be harmless error. (44a). The writ

of habeas corpus was, therefore, granted with directions that respondent be afforded a new trial.

B. The Court of Appeals Decision.

The United States Court of Appeals for the Third Circuit affirmed the district court's ruling on February 24, 1989. Fuller v. Diesslin, 868 F. 2d 604 (3rd Cir. 1989). The majority opinion concluded that: (1) a qualified right to retain non-resident counsel of choice is included within the Sixth Amendment right to counsel of choice; (2) that the state court's denial of Mr. Fuller's chosen counsel was arbitrary; and (3) that the arbitrary denial of counsel of choice is per se reversible error. Judge Weis's dissenting opinion was limited to a disagreement as to whether the state trial judge had acted arbitrarily.

Petitioner's filed a petition for rehearing on March 6, 1989, which was denied on March 24, 1989. On June 22, 1989, the Court of Appeals granted Petitioner's Motion to Vacate and Recall Issuance of the Mandate Pending Application to the Supreme Court of the United States for a Writ of Certiorari.

A Petition for a Writ of Certiorari was filed on June 27, 1989. By letter dated July 18, 1989, this Court granted respondent a two week extension of time, until August 7, 1989, in which to file a response to the petition for a writ of certiorari.

REASONS FOR DENYING THE WRIT

INTRODUCTION

THE SIXTH AMENDMENT PROTECTS THE RIGHT TO COUNSEL OF CHOICE

The Sixth Amendment "guarantees a defendant the right to be represented by an otherwise qualified attorney whom that defendant can afford to hire, or who is willing to represent the defendant even though he is without funds." Caplin and Drysdale, Chartered v. United States, 45 CrL 3145 (6/21/89). "...[T]he right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment..." Wheat v. United States, 108 S.Ct. 1692, 1697 (1988).

The selection of preferred counsel is an important aspect of the Sixth Amendment both because it is the critical first step in formulating a defense and because it fosters confidence between an accused and his representative. Choosing one's lawyer is "the most important decision a defendant makes in shaping his defense..." United States v. Laura, 607 F. 2d 52, 56 (3rd Cir. 1979). "The right to choose one's own counsel is an essential component of the Sixth Amendment because, were a defendant not provided the opportunity to select his own counsel at his own expense, substantial risk would arise that the basic trust between counsel and client, which is a cornerstone of the adversary system, would be undercut." Linton v. Perini, 656 F. 2d 207,. 209 (6th Cir. 1981). See also, United States v. Bissell, 866 F. 2d 1343, 1351 (11th Cir. 1989).

A defendant's Sixth Amendment right to counsel of choice is qualified and may be overridden in a variety of circumstances. Wheat v. United States; Caplin and Drysdale Chartered v. United States; Morris v. Slappy, 461 U.S. 1 (1983). An accused may, however, not be denied his preferred attorney unless there are substantial reasons which outweigh his interest in counsel of choice. A court's decision to deny counsel of choice must stem from a reasoned balancing of the various interests at stake. Wheat v. United States; Wilson v. Mintzes, 761 F. 2d 275, 280 (6th Cir. 1985); United States v. O'Malley, 786 F. 2d 786, 790 (7th Cir. 1986). Petitioner acknowledges that an accused may not be denied his preferred counsel absent substantial countervailing reasons. "While a defendant's choice may not be denied arbitrarily, a defendant's right to choose his own counsel must be balanced against the fair and proper administration of justice." (Petition For Certiorari at 12).

Despite the recognition that counsel of choice is constitutionally protected, Petitioner quarrels with the Third Circuit's decision. Petitioner argues that it is not arbitrary to deprive a defendant of his preferred attorney even when the only "factual" basis for the denial is speculation that travel delays may impede the processing of the case. Secondly, Petitioner asserts that the right to counsel of choice does not extend to pro hac vice admissions. Finally, Petitioner says that denials of counsel of choice should be reviewed by the same tests used to measure claims of ineffective assistance of counsel. Petitioner's

contentions lack factual and legal merit and do not warrant review by this Court.

A. GLEN FULLER WAS ARBITRARILY PRECLUDED FROM RETAINING HIS PREFERRED COUNSEL

1. The Trial Court's Denial was Premised on Unfounded Speculation

No facts support the trial court's denial of the pro hac vice applications of retained counsel of choice. The court's refusal to allow Glen Fuller his counsel of choice was based exclusively on a generalized fear that delays would arise because the attorneys Mr. Fuller wanted would have to travel. "It's just, that's just the nature of the mails, that's the nature of travel, that's the nature of transit in this matter." (98a). The court did not make any findings or have any information to indicate that Mr. Pritzker or Mr. Stroup had, or would, delay matters.[3] It simply concluded that out-of-state equals delay.[4] The Third Circuit properly affirmed the district court's holding that a per se assumption that out-of-state lawyers will delay proceedings is no more than a "blanket generalization" which "leaves no room for the exercise of discretion." (42a).

Petitioner assails the ruling of the district court and the Third Circuit, but does not point to any facts which would

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[3] To the contrary, local counsel informed the court that neither attorney had ever missed a court appearance unless he was actually engaged in another matter.

[4] The Court's worries have an ironic ring since the subsequent proceedings leading up to Mr. Fuller's entry of a conditional guilty plea took three and one half years.

demonstrate that the trial court's decision was something more than an abuse of discretion. Petitioner's statement that the trial court found that "out-of-state counsel had not coordinated properly with local counsel as provided by the court rule" (Petition For Certiorari at 28) is not true and is belied by the record which shows that the applications for the admission of pro hac vice counsel fully complied with Rule 1:21-2. The other factors invoked by Petitioner merely recapitulate the unsupported assumption that the need for Mr. Pritzker and Mr. Stroup to travel would inevitably result in delay. Petitioner's attack on the Third Circuit's finding of an arbitrary denial of counsel of choice is not premised on any new arguments and does not require review by this Court.

2. The Trial Court Made No Findings of Fact Entitled to Deference under 28 U.S.C. Sec. 2254 (d)

New Jersey states that the Third Circuit erred in failing to give proper deference to the state court's "factual findings." According to petitioner, the record reveals that the state court "carefully balanced all relevant factors" and "reflected a thoughtful concern for the balancing of a hectic and crowded trial calendar with respondent's rights." (Petition For Certiorari at 28). The trial court, as noted above, did not make any findings of fact regarding either the past or present ability of Mr.

Pritzker or Mr. Stroup in complying with the court's schedule.[5] The only factors which the State can point to in support of the decision to deny the applications for admission are the trial court's presuppositions regarding the alleged vagaries of air travel and the difficulties attendant in co-ordinating the schedules of out-of-state counsel.[6] A court's guesses are not findings of fact which need be given deference under 28 U.S.C. Sec. 2254 (d). Holland v. Attorney General of New Jersey, 777 F. 2d 150, 155 (3rd Cir. 1985).

3. The Third Circuit's Ruling that Courts may not Automatically Assume that Nonresident Counsel are Incapable of Meeting Schedule Requirements is Consistent with this Court's Decisions

The Third Circuit's limited holding that a "court may not assume that out-of-state attorneys will not be capable of meeting the court's schedule" (16a-17a) tracks prior decisions of this Court. The Court has invalidated rules which predicate the exclusion of out-of-state attorneys on the theory that their non-resident status will necessarily occasion delay. Frazier v. Heebe, 107 S.Ct. 2607 (1987); Supreme Court of New Hampshire v. Piper, 470

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[5] The trial court--after stating that it would "love to know" how many appearances had been delayed by Mr. Pritzker or Mr. Stroup--rejected local counsel's request to adduce testimony on that subject. Both out-of-state counsel had submitted affidavits which stated that they had never missed a court proceeding unless they were actually engaged in another matter.

[6] Petitioner argues that Mr. Fuller's request for two nonresident attorneys exacerbated potential scheduling problems. In fact, just the opposite is true. Mr. Pritzker and Mr. Stroup were from the same firm. It is particularly unlikely that both attorneys would be the simultaneous victims of travel delay.

U.S. 274 (1985). "We also do not believe that an alleged need for immediate availability of attorneys in some proceedings requires a blanket rule that denies all nonresident attorneys admission to a district court." Frazier at 2613.

The outmoded assumption that nonresident attorneys foreshadow delay is contradicted by the increasing recognition that interstate law practice is a present-day reality. For example, the New Jersey Supreme Court has remarked on "the dramatic increase in interstate travel and the corresponding increase in interstate law practice." In re Sackman, 90 N.J. 521, 532 (1982). Similarly, the Third Circuit, nine years ago, noted that we now live in "the era of interstate practice of law." Johnson v. Trueblood, 629 F. 2d 302, 303 (3rd Cir. 1980). These judicial observations reflect the fact that lawyers--like businessmen and practitioners of every other stripe--are not automatically foreclosed by state boundaries from timely meeting their obligations. This self-evident proposition does not need further exposition by this Court.

B. THE SIXTH AMENDMENT ENCOMPASSES A QUALIFIED RIGHT TO RETAINED COUNSEL OF CHOICE

The State urges that a Sixth Amendment right to retained out-of-state counsel of choice "should not exist, at least where there has been no showing that local counsel was incompetent or refused to represent a defendant." (Petition for Certiorari at 16). The State's position both misstates the scope of the Third Circuit's ruling and fails to take into account the importance of out-of-state attorneys.

1. The Third Circuit's Decision Does Not Restrict New Jersey from Regulating the Admission of Nonresident Attorneys

Contrary to Petitioner's exaggerated claim, this case does not mean that "the court of appeals has sanctioned the right of a defendant to choose counsel who are not members of the bar[7] as freely as he would a local attorney..." (Petition For Certiorari at 14). Mr. Fuller did not challenge and the Third Circuit did not question New Jersey's rules regarding pro hac vice admissions. The Third Circuit only concluded that New Jersey courts may not arbitrarily apply the rules so as to deny a request for out-of-state counsel of choice where counsel has complied with the relevant local rules and where no other factors exist which would demonstrate the reasoned exercise of discretion in passing on the application. Thus, the Third Circuit's decision does not imperil any legitimate interest New Jersey has in regulating the admission of cut-of-state attorneys. The ruling simply prohibits New Jersey courts from arbitrarily barring out-of-state counsel of choice by reciting generalized fears that have no record support.[8]

2. There is No Split Among The Circuits Regarding the Qualified Right to Retained Non-resident Counsel of Choice

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[7] Presumably, petitioner means members of the local bar. There is no dispute that Messrs. Pritzker and Stroup were attorneys in good standing in their respective jurisdictions.

[8] New Jersey courts themselves recognize that courts must exercise discretion when passing on pro hac vice applications. Burlington County Internal Medicine Ass'n v. American Medicorp, Inc., 168 N.J. Super. (1982).

New Jersey professes to discern a split in the circuits as to whether "a denial of a defendant's motion to have an attorney represent him pro hac vice can be a denial of his Sixth Amendment right to counsel of choice." (Petition for Certiorari at 14). This supposed division does not exist. First, Mr. Fuller does not claim and the Third Circuit did not find that there is an unrestricted right to pro hac vice counsel of choice.[9] The issue raised by Mr. Fuller's petition is only whether a trial court may arbitrarily refuse to admit retained counsel of choice on the basis of a generalized and unsupported assumption that out-of-state counsel necessarily entail delay.

The federal cases which actually address the question at issue affirm that the sixth amendment right to choice of counsel encompasses the arbitrary denial of nonresident retained counsel of choice. United States v. Panzardi-Alvarez, 816 F. 2d 813 (1st Cir. 1987); Ford v. Israel, 701 F. 2d 689 (7th Cir. 1983); Lefton v. City of Hattiesburg, 333 F. 2d 280 (5th Cir. 1964).

Petitioner miscites two federal cases to manufacture a non-existent conflict as to whether the sixth amendment precludes the arbitrary exclusion of nonresident counsel of choice. Bedrosian v. Mintz, 518 F. 2d 396 (2nd Cir. 1975) considered the claim of indigent defendants who sought the appointment of out-of-state

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[9] There is, of course, a serious constitutional issue as to whether a state could enact rules regarding the admission of out-of-state counsel in criminal cases which would either directly or practically prohibit a defendant from retaining a non-local attorney of choice. That question, however, is not raised in the case at bar.

counsel. The Second Circuit held that the defendants had no right to have out-of-state appointed counsel because of the state's "legitimate interest in developing a pool of competent attorneys to represent indigents." 518 F. 2d at 401. Indeed, the state court in Bedrosian permitted retained out-of-state counsel to appear on behalf of co-defendants. Ross v. Reda, 510 F. 2d 1172 (6th Cir. 1975), cert denied, 423 U.S. 892 (1975) involved questions of attorney misconduct and did not consider the appropriate result for an arbitrary refusal to admit out-of-state counsel of choice. Neither case is authority for Petitioner's claim of a division among the circuits.

Although this Court has never ruled on the precise question, it has recognized the unique importance of nonresident counsel. For example, Supreme Court of New Hampshire v. Piper observes that "[I]n some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights." 470 U.S. at 281. New Jersey's suggestion that the right to counsel of choice can never be violated in cases of pro hac vice admissions is certainly inconsistent with this recognition of the often crucial role played by out-of-state attorneys.

In short, New Jersey cannot point to any case or constitutional value to support its claim that the sixth amendment is inapplicable to a defendant's selection of retained out-of-state counsel. Prohibiting arbitrary denials does not deprive courts of broad discretion in passing on pro hac vice admissions. Courts need only perform a reasoned balancing of the various interests at

stake when passing on pro hac vice requests. This requirement is certainly not too great a price to pay in light of a defendant's compelling interest in shaping the contours of his defense and in being represented by counsel whom he trusts.

C. REQUIRING A DEFENDANT TO DEMONSTRATE PREJUDICE BEFORE HE COULD OBTAIN RELIEF FROM THE IMPROPER DENIAL OF COUNSEL OF CHOICE WOULD ELIMINATE THE RIGHT TO COUNSEL OF CHOICE ALTOGETHER.

Petitioner urges that a defendant deprived of his counsel of choice should have no redress unless he can demonstrate prejudice under the tests set forth in Strickland v. Washington, 466 U.S. 668 (1984) and Hill v. Lockhart, 474 U.S. 52 (1985).[10] Strickland and Hill require an accused who asserts that he was denied the effective assistance of counsel to both show that his attorney's performance was defective and that there is a "reasonable probability that but for the unprofessional performance, the result would have been different. This approach would, if applied to denials of attorneys of choice, effectively extinguish the right to preferred counsel.

The right to counsel of choice cannot be enforced if a defendant must show that the lawyer who represented him was constitutionally ineffective before he can obtain relief. As this

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[10] Respondent emphatically does not concede that he was not prejudiced by the denial of his chosen counsel. Because the district court and the Third Circuit correctly held that a showing of prejudice is unnecessary in cases where counsel of choice is arbitrarily denied, respondent has never had to demonstrate prejudice. The fact that respondent has never had to make such a showing does not mean that a lack of prejudice can or should be presumed.

Court recognizes, "[T]here are countless ways to provide effective assistance in any given case." Strickland v. Washington at 689. At the same time, not all strategies or lawyers, even constitutionally effective ones, are equally good. "Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." Strickland at 693. "Attorneys are not fungible, as are eggs, apples and oranges." United States v. Laura, 607 F. 2d 52, 56 (3rd Cir. 1979).

Precisely because the practice of law is an art, a prejudice standard for the denial of counsel of choice obliterates the distinction between the qualified constitutional right to preferred counsel and the absolute right to effective counsel. The qualified right to have the best and most trusted lawyer one can afford is not protected by a post-trial review which focuses on whether one's trial lawyer was minimally effective. Although difficult, a trial record can be scrutinized for acts or omissions of counsel which were demonstrably incompetent and prejudicial. Degree of skill and soundness of strategy are not, however, subject to the same calculus. Excellence cannot be evaluated by a Strickland standard. Since a right without a remedy ceases to be a right, there would be no right to counsel of choice if a defendant had to prove he was prejudiced by the denial of his preferred lawyer.

A harmless error test is also a poor remedy for the denial of counsel of choice because the right "reflects constitutional protection of the defendant's free choice independent of concern

for the objective fairness of the proceedings." United States v. Flanagan, 465 U.S. 259, 268-9 (1984). The right to preferred counsel also fosters important public policy values. The confidence of the public in the fairness of the criminal justice system is increased by forbidding courts or the prosecution from arbitrarily denying a defendant the lawyer he trusts and wants. The fairness of the adversarial process itself is also heightened when both parties are allowed to shape the contours of their strategies and select their advocates

Petitioner does not identify any value that would be served by effectively foreclosing recourse for the denial of counsel of choice. Instead, petitioner's argument for a Strickland standard is derived from a defective syllogism. Petitioner cites Wheat v. United States, 108 S.Ct. 1692, 1697 (1988) for the proposition that the purpose of the right to counsel of choice is "to ensure an effective advocate for a criminal defendant." This Court has previously decided that convicted defendants who claim ineffective assistance of counsel must demonstrate a "reasonable probability" that the outcome would have been different but for the alleged errors. Strickland v. Washington at 694. Thus, says petitioner, it makes "no sense" to apply a different standard to the denial of counsel of choice since both aspects of the right have the same final aim. (Petition for Certiorari at 21).

Petitioner's reasoning is deficient even if the independent values secured by the right to counsel of choice are put aside. The fact that various rights included in the Sixth Amendment may

have a common goal does not mean that a single mechanism is appropriate for reviewing violations of each right. For example, the right to a public trial and the right to effective assistance of counsel are both guaranteed by the Sixth Amendment. See, Strickland v. Washington and Waller v. Georgia, 467 U.S. 39 (1984) [Sixth Amendment right to public trial]. Both aspects of the Sixth Amendment have the aim of ensuring a fair trial. Strickland at 685; Waller at 46. Yet, a defendant who is denied a public trial need not demonstrate prejudice while a defendant who can show that his counsel acted ineffectively must also show that a different result probably would have been obtained but for the mistakes made by his counsel.

Waller recognizes that there are certain Sixth Amendment violations where demonstration of prejudice is a "practical impossibility." (fn. 9 at 50, citing People v. Jones, 47 N.Y. 2d 409, 416 (1979)]. Denial of counsel of choice falls into this category. There are an infinite number of decisions which must be made during the course of a criminal proceeding. The level of skill with which the decisions are implemented will range from supremely talented to minimally competent. A Strickland test is manifestly unfeasible for measuring the intangible but critical differences between lawyers and tactics. Indeed, the more difficult the case, the more likely that the imagination, skill, and dedication of a particular lawyer will make a difference. Yet, hard cases are those in which a reviewing court is most likely to find harmless error.

Every federal court to directly confront the issue has held that the improper denial of counsel of choice is per se reversible error.[11] See, e.g., United States v. Panzardi Alvarez, 816 F. 2d 813 (1st Cir. 1987); United States v. Rankin, 779 F. 2d 956 (3rd Cir. 1986); Linton v. Perini, 656 F. 2d. 207 (6th Cir. 1981), cert. denied, 454 U.S. 1162 (1982). United States v. Diozzi, 807 F. 2d 10, 16 (1st Cir. 1986) explains that at a harmless error test would "entirely eviscerate a defendant's right to counsel of choice." Wilson v. Mintzes, 761 F. 2d 275, 286 (6th Cir. 1985) is equally emphatic. "Requiring an accused to establish that he was prejudiced by a trial judge's denial of his motion for substitution would focus our attention on the result obtained by the

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[11] Petitioner states that Williams v. Nix, 751 F. 2d 956 (8th Cir. 1985) applies a harmless error test to the arbitrary denial of counsel of choice. (Petitioner's brief at 18). This assertion is inaccurate. Williams found that the possibility that the presence of out-of-state counsel might hinder the orderly processing of the case constituted "a sufficient countervailing state interest" so as to justify the denial of appointment of counsel of choice. The court then went on to consider Williams' equal protection argument. (The trial court apparently ruled that Williams could have had out-of-state counsel if he could have retained his desired attorney). The Eighth Circuit applied a harmless error test only to Williams' equal protection claim--not to the claimed Sixth Amendment violation which was found not to have occurred.

Similarly, contrary to Petitioner's assertion, the New Jersey courts have never held that a harmless error test is an appropriate method to review the arbitrary denial of counsel of choice. State v. Chappee, 211 N.J. Super. 321 (App. Div. 1986) held that Mr. Fuller and Mr. Chappee were not arbitrarily denied their counsel of choice. The Court never reached the issue as to what result should obtain when counsel of choice is arbitrarily denied. Indeed, the Appellate Division specifically stated that "...we do not suggest that the absence of discernable prejudice from denial of defendants' motion for admission of counsel pro hac vice in itself precludes defendants from obtaining relief by reason of the denial..." (63a).

substitution rather than on the accused's right to exercise such choice. Therefore, requiring a showing of prejudice would obliterate the heretofore recognized right of the accused to counsel of his choice, would reduce the balancing approach of Linton and Burton to a parroting of Strickland, and would lock the accused into his first selection of counsel unless he can prove conduct rising to the level of constitutional ineffectiveness."

Both logic and precedent, therefore, compel the conclusion that automatic reversal is the appropriate test for the arbitrary denial of counsel of choice. Only last year, this Court held that a per se reversible error test is required for Sixth Amendment violations which pervade the entire proceeding. Satterwhite v. Texas, 108 S.Ct. 1792, 1797 (1988). The selection of counsel of choice--a decision which influences every aspect of the subsequent proceedings--falls squarely within the category of such a violation and such a remedy.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ALAN SILBER*
Hayden, Perle and Silber
177 Prince Street
New York, N.Y. 10012
212-677-1006

Attorney for Respondent

MARK B. GOMBINER
Of counsel and on the Brief

* Counsel of Record for the Respondent

CERTIFICATE OF SERVICE

Alan Silber, a member of the bar of the Supreme Court of the United States, hereby certifies that on this day a copy of the within brief in opposition to the petition for a writ of certiorari was served upon the Deputy Attorney General and the original filed with the Clerk of the Supreme Court by mailing said copies by Federal Express, overnight delivery, to the following addresses:

Debra L. Stone
Deputy Attorney General
Division of Criminal Justice
Appellate Section
P.O. Box CN 086
Trenton, New Jersey 08625

Joseph F. Spaniol, Jr., Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Dated: [illegible]

Alan Silber

81 JUL 9 09:00

PELLETTIERI, RABSTEIN AND ALTMAN
☒ P & R BUILDING
13 WEST FRONT STREET
TRENTON, NEW JERSEY 08604
(609) 989-7000
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199 NASSAU STREET
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(609) 921-3001
ATTORNEYS FOR Defendant, Glen Stephen Fuller

THE STATE OF NEW JERSEY, Plaintiff, v. DOUGLAS DAVID CHAPPEE and GLEN STEPHEN FULLER, Defendants.	)	SUPERIOR COURT OF NEW JERSEY CRIMINAL DIVISION - MIDDLESEX COUNTY INDICTMENT NO. 838-80 CRIMINAL ACTION NOTICE OF MOTION TO BE ADMITTED PRO HAC VICE

TO: RICHARD S. REBECK,
Middlesex County Prosecutor
9th Floor
Administration Building
New Brunswick, NJ 08903

SIR:

PLEASE TAKE NOTICE that on Thursday, July 9, 1981, at 9:00 a.m. in the forenoon or as soon thereafter as counsel may be heard, the undersigned attorneys for the defendant, Glen Stephen Fuller, shall move before the Honorable C. Judson Hamlin, Superior Court of New Jersey, Criminal Division, Middlesex County, at the Court House, New Brunswick, New

RESPONDENT'S
APPENDIX -A

Jersey pursuant to Rule 1:21-2 to have Michael L. Pritzker, Esquire of Stroup, Goldstein, Jenkins & Pritzker, admitted Pro hac vice to serve as co-counsel to co-defendants, Glen Stephen Fuller and Douglas David Chappee, in the above captioned matter.

This Motion is made pursuant to Rule 1:6-2 and the undersigned submits the Affidavit of Richard M. Altman, Esquire, in support thereof.

PELLETTIERI, RABSTEIN & ALTMAN
Attorneys for Defendant, Fuller

BY: Richard M. Altman
RICHARD M. ALTMAN

Dated: July 8, 1981

PROOF OF SERVICE

The original of the within Notice of Motion has been hand-delivered to the Clerk of Middlesex County, Middlesex County Court House, New Brunswick, New Jersey.

On July 9, 1981, I hand-delivered to Richard S. Rebeck, Middlesex County Prosecutor, 9th Floor, Administration Building, New Brunswick, New Jersey, the following: NOTICE OF MOTION TO BE ADMITTED PRO HAC VICE.

I hereby certify that the foregoing statements are true and if any of the statements made by me are wilfully false, I am subject to punishment.

Richard M. Altman
RICHARD M. ALTMAN

FILED
JUL 19 1981

PELLETTIERI, RABSTEIN AND ALTMAN
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ATTORNEYS FOR Defendant, Glen Stephen Fuller

THE STATE OF NEW JERSEY, Plaintiff,	)	SUPERIOR COURT OF NEW JERSEY CRIMINAL DIVISION - MIDDLESEX COUNTY INDICTMENT NO. 938-80
v.		
DOUGLAS DAVID CHAPPEE and GLEN STEPHEN FULLER, Defendants.	)	CRIMINAL ACTION AFFIDAVIT

RICHARD M. ALTMAN, ESQUIRE, of full age and being duly sworn, deposes and says as follows:

1. I am a partner in the firm of Pellettieri, Rabstein and Altman, and I am serving as local counsel for the defendant, Glenn Stephen Fuller, in the above captioned matter.

2. I have been retained as local counsel to assist in the preparation of pleadings and to make appearances as necessary.

3. I want the Court to know that I have been retained solely as local counsel in this matter and that both the fee arrangement and the work prepared by my office reflect that status. The understanding between the firm of Stroup, Goldstein,

Jenkins and Pritzker and Pellettieri, Rabstein and Altman was that we would move their admission before the Court Pro hac vice and sign all pleadings submitted to the Court in the above captioned matter in behalf of the defendant, Glen Fuller.

4. I was not retained to prepare Motions, brief issues, or elicit testimony in any form in this matter in behalf of defendant, Fuller. As of this writing I have never even met the defendant, Glen Fuller nor the defendant, Douglas Chappee. Throughout these proceedings it has been made clear to me that Messrs. Chappee and Fuller wanted the services of Michael L. Pritzker and Keith Stroup of Stroup, Goldstein, Jenkins, and Pritzker and did not desire to retain my services or the services of any member of our firm, aside from the limited role of local counsel. Michael L. Pritzker, Esquire, is a seasoned criminal attorney who practices almost exclusively in drug-related cases. He has been admitted to the United States Supreme Court, the Third, Fifth, Seventh, Eighth and Ninth Circuits, Circuit Courts of Appeals, as well as to the Supreme Court of Illinois. Mr. Pritzker has also been admitted to the Superior Court of New Jersey, Somerset County, Pro hac vice in 1975 and 1976.

5. Mr. Pritzker is a partner and member of the firm of Stroup, Goldstein, Jenkins and Pritzker which is a multi-state firm specializing in criminal law and more particularly in drug-related cases. Keith Stroup is located in Washington, D.C., Mr. Golstein in San Antonio, Texas, Mr. Jenkins in Atlanta, Georgia and Mr. Pritzker in Chicago, Illinois. The

members of this firm practice almost exclusively in jurisdictions other than the ones in which they are located.

6. Mr. Pritzker is a member in good standing of the Illinois Bar as well as the American Judicatur Society, The American Trial Lawyers Association, The American Bar Association, The National College of Criminal Defense Attorneys, the Illinois State Bar Association and the Chicago State Bar Association.

7. I am familiar with the members of the firm of Stroup, Goldstein, Jenkins and Pritzker and I can attest to the fact that they are not only qualified attorneys, and members in good standing of their respective Bars, but also responsible to the various Courts in which they appear. Mr. Pritzker is used to practicing on a nation-wide basis and he has indicated that he has never missed a Court scheduled appearance for any reason other than he was held over by a Court in another jurisdiction.

8. For all of the above reasons I would move for the admission of Michael L. Pritzker, Pro hac vice to represent the co-defendants, Fuller and Chappee in the above captioned matter and to serve as co-counsel with Keith L. Stroup of the same firm.

Richard M. Altman

RICHARD M. ALTMAN

Sworn to and Subscribed
Before me this 22 day
of July , 1981

Carol A. Hawley
Notary Public of
New Jersey

SUPERIOR COURT OF NEW JERSEY
CRIMINAL DIVISION:
MIDDLESEX COUNTY
INDICTMENT NO. 938-80

THE STATE OF NEW JERSEY,	:	
Plaintiff,	:	
v.	:	Criminal Action
DOUGLAS DAVID CHAPPEE and GLEN STEPHEN FULLER,	:	
Defendants.	:	

AFFIDAVIT IN SUPPORT OF DEFENDANT FULLER'S MOTION TO ADMIT COUNSEL PRO HAC VICE

R. Keith Stroup
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~~Robert Aultman~~
Ann Nelson
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(609) 989-7000

Attorneys for Defendant Glen S. Fuller

AFFIDAVIT OF GLEN STEPHEN FULLER

The purpose of this affidavit is to attest to the fact that I have by my own free will and choice selected attorneys R. Keith Stroup of Washington, D.C. and Michael L. Pritzker of Chicago, Illinois to defend me against charges pending in the case of the State of New Jersey v. Douglas David Chappee and Glen Stephen Fuller, in the Superior Court of New Jersey, Criminal Division, Indictment No. 938-80. I have retained Mr. Stroup and Mr. Pritzker on the basis of my belief that they possess specialized experience and qualifications which would most effectively serve me in the charges currently pending. I have consulted with several individuals before making this decision, and I am convinced that Mr. Stroup and Mr. Pritzker are the most qualified individuals to handle my defense. I have authorized Mr. Stroup and Mr. Pritzker to hire the firm of Pellettieri, Robstein & Aultman, of Trenton, New Jersey to serve as local counsel in this matter, and in that capacity to be responsible to receive service of all pleadings and other documents in this matter, and to fully advise Mr. Stroup and Mr. Pritzker of all local and state rules of the court and procedures. I am extremely satisfied with the representation I have received thus far from Mr. Stroup and Mr. Pritzker and from my local counsel, and wish to continue this relationship.

I have already expended a considerable sum of money to retain the aforementioned lawyers to represent me in this matter, and I would suffer considerable financial loss were I required to hire other counsel.

It is my intent to pursue what I believe to be my legitimate constitutional right to be represent by the aforementioned counsel of my choice. Should the Court refuse to admit Mr. Stroup and Mr. Pritzker as my lead counsel pro hac vice, I would need a postponement before proceeding with the hearings in the case to interview and retain other counsel of my own choosing.

I make the aforementioned statement under oath and attest to its truth and accuracy.

Signed,

7/6/81
Date

GLEN STEPHEN FULLER

Sworn to and subscribed before me this

7th day of July, 1981.

Richard M Pearson
Attorney at Law of the State of Utah

Notary Public

My Commission expires: _____

HAYDEN, PERLE AND SILBER

177 PRINCE STREET, NEW YORK, NEW YORK 10012
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JOSEPH A. HAYDEN, JR., P.C.*
MICHAEL R. PERLE, P.C.*
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MERRILL N. RUBIN*
OF COUNSEL

*MEMBER OF NEW JERSEY AND NEW YORK BARS
†MEMBER OF CALIFORNIA BAR
‡MEMBERS OF NEW JERSEY BAR

Reply to New York

August 4, 1989

Hon. Joseph F. Spaniol, Jr.
Clerk
Supreme Court of the United States
Supreme Court Building
Washington, D.C. 20543

Re: Perretti v. Fuller
88-2068

Dear Mr. Spaniol,

Enclosed please find original of Respondent's Brief in Opposition to Petition for Writ of Certiorari together with Motion for Leave to Proceed In Forma Pauperis and proof of service.

Thank you for your attention to this matter.

Very truly yours,

Alan Silber, Esq.
Attorney for respondent

cc: Debra Stone, Esq.

RECEIVED
AUG - 8 1989
OFFICE OF THE CLERK
SUPREME COURT, U.S.

78-2068

CERTIFICATE OF SERVICE

Alan Silber, a member of the bar of the Supreme Court of the United States, hereby certifies that on this day a copy of the Motion for Leave to Proceed In Forma Pauperis was served upon the Deputy Attorney General and the original filed with the Clerk of the Supreme Court by mailing said copies by Federal Express and Express Mail, overnight delivery, to the following addresses:

Debra L. Stone
Deputy Attorney General
Division of Criminal Justice
Appellate Section
P.O. Box CN 086
Trenton, New Jersey 08625

Joseph F. Spaniol, Jr., Clerk
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543

Dated: 8/4/79

Alan Silber